No. 416

# In the Supreme Court of the United States

OCTOBER TERM, 1967

FLORENCE FLAST, ET AL., APPELLANTS,

*v.*

JOHN W. GARDNER, AS SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK*

## MOTION TO DISMISS OR AFFIRM

RALPH S. SPRITZER,
*Acting Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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## MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees move to dismiss this appeal or, in the alternative, to affirm the judgment of the district court.

### STATEMENT

This is a direct appeal, under 28 U.S.C. 1253, from a decision of a three-judge district court (J.S. App. 11–46; 267 F. Supp. 351) dismissing the complaint herein for lack of jurisdiction of the subject matter (J.S. App. 18). The complaint prayed for an injunction restraining appellees from "approving any program for the expenditure of Federal funds to finance * * * instruction or guidance services in religious and



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sectarian schools, or the purchase of textbooks and instructional and library materials for use in religious and sectarian schools."[1] The complaint alleged that in administering Titles I and II of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241a *et seq.*, 821 *et seq.* (Supp. I, 1965)), appellees are approving such programs in violation of the First Amendment. Appellants are alleged to be citizens and taxpayers of the United States and the State of New York.

The three-judge district court, with one dissent, held that appellants have no standing as federal taxpayers to contest the expenditure of federal funds, under this Court's decision in *Frothingham* v. *Mellon,* 262 U.S. 447. The dissenting judge urged that *Frothingham* v. *Mellon* is inapplicable to a suit contesting federal expenditures as violative of the Establishment Clause of the First Amendment.

Under Title I of the Elementary and Secondary Education Act, federal grants to local educational agencies are authorized when the local agency presents an application which the appropriate State educational agency determines to meet the various criteria set forth in the Act. 20 U.S.C. 241e (Supp. I, 1965). The local agency's plan must be designed "to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families." *Ibid.* Title II of the Act authorizes federal grants to States which submit plans meeting various criteria set

[1] For the convenience of the Court, we set forth the text of the complaint as an appendix hereto (*infra.*, pp. 9–14).

forth in the Act. 20 U.S.C. 823 (Supp. I, 1965). State programs under Title II must be designed to acquire library resources and other instructional materials for use in public and private elementary and secondary schools. *Ibid.*

## ARGUMENT

The sole question presented on this appeal (see J.S. 3) is whether the operation of a federal program of aid to education may be enjoined, on the ground that it violates the Establishment and Free Exercise clauses of the First Amendment, at the suit of plaintiffs who allege no connection with that program other than that they are citizens and taxpayers of the United States.

We submit that the court below correctly held that this case is governed by *Frothingham* v. *Mellon,* 262 U.S. 447. In that case a taxpayer sought to enjoin federal appropriations to combat maternal and infant mortality under the Maternity Act of 1921, contending that that Act usurped powers reserved to the States by the Tenth Amendment. This Court held unanimously that a federal taxpayer, as such, lacks standing to obtain judicial review of a federal statute because he cannot show that "he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." 262 U.S. at 488.

The principle of *Frothingham* is fully applicable to cases involving the Establishment Clause of the First

Amendment. *Doremus* v. *Board of Education,* 342 U.S. 429. To be sure, as the dissenting opinion below points out, one purpose of the Establishment Clause was to protect citizens from taxation to support a church. But under a Constitution that established a government of limited and enumerated powers, virtually every claim that the prescribed bounds have been exceeded may be accompanied by the assertion that tax revenues are being put to an impermissable use. The critical consideration here, as in *Frothingham,* is that appellants can allege no more than that they suffer "in some indefinite way in common with people generally." 262 U.S. at 448.

Surely the fact that constitutional rights are asserted here cannot relieve appellants from the necessity of demonstrating an interest less "indeterminable, remote, uncertain and indirect" than that of a taxpayer in the moneys of the federal treasury. *Doremus* v. *Board of Education,* 342 U.S. at 433. Indeed, strict compliance with jurisdictional requirements is especially important where the suit seeks to invalidate a federal statute on constitutional grounds. "Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 341 (concurring opinion of Brandeis, J.); *Blair* v. *United States,* 250 U.S. 273, 279.

In prior cases involving the question of whether

school programs violated the Establishment or Free Exercise Clauses of the First Amendment, the plaintiffs were either taxpayers of a local school district, or the parents of affected school children. *Abington School District* v. *Schempp,* 374 U.S. 203; *Engel* v. *Vitale,* 370 U.S. 421; *Zorach* v. *Clauson,* 343 U.S. 306; *McCollum* v. *Board of Education,* 333 U.S. 203; *Everson* v. *Board of Education,* 330 U.S. 1. Thus in each case this Court could consider the constitutional questions raised in the context of a particular program as it operated in a particular school district.

By contrast, petitioners here seek a broad ruling as to all federal grants under Titles I and II of the Elementary and Secondary Education Act. The Act provides for federal financing of local or State programs; such programs do not have to be uniform from State to State or district to district, so long as they meet the standards of the Act and the regulations thereunder. 20 U.S.C. 241e, 823 (Supp. I, 1965); 45 C.F.R. 116.16 *et seq.,* 117.2 *et seq.*[2] Indeed, appellants allege

[2] The Senate committee report on the Act lists 49 possible types of programs that could be financed under Title I, and states that the list was not intended to be exhaustive. Sen. Rept. No. 146, 89th Cong., 1st. Sess., at 10–11. The Senate report also evidences the congressional expectation "that State plans regarding the administration of [Title II] programs will vary from State to State." *Id.* at 23. In particular, the committee suggested that some States might wish to establish "a central public depository within a school district or within an area to serve more than one school district from which all elementary and secondary schoolchildren and teachers could 'check out' library resources" (*ibid.*). It seems likely that such a program would raise fewer constitutional doubts, if any, than a program by which school books were placed in the libraries of church-operated schools. Compare *Zorach* v. *Clauson, supra,* with *McCollum* v. *Board of Education, supra.*

that there are many programs which would qualify for assistance under Title I of the Act without any constitutional infirmity and that the Board of Education of New York City has in fact adopted such programs. (Complaint, paras. 9–11). Nevertheless, the complaint is not addressed to any specific program either adopted or proposed. The complaint does not allege that any particular local agency, any place in the country, has or may present an unconstitutional program. In these circumstances, it seems evident that appellants seek to have an act of Congress declared unconstitutional in the abstract rather than with reference to an indentified injury flowing from a particularized set of facts in a determinate context. But that is precisely the sort of adjudication which this Court has consistently declined to undertake.

Many decisions of this Court indicate that the varying details of programs approved under the Act could well be of critical significance from a constitutional standpoint.[3] But absent a detailed consideration of each and every State and local program submitted for approval under Titles I and II of the Act, appellants' complaint could be adjudicated only by a broad and hypothetical declaration as to what possible types of programs qualifying for assistance under the Act would or would not be constitutionally permissible. In short, by failing to attack a specific program

[3] See *Zorach* v. *Clauson*, 343 U.S. 306; *McCollum* v. *Board of Education*, 333 U.S. 203; *Everson* v. *Board of Education*, 330 U.S. 1. See also opinion of Frankfurter, J. in *McCollum* v. *Board of Education*, 333 U.S. 203, 226, stressing the importance of "detailed analysis of the facts to which the Constitutional test of Separation is to be applied."

as it impinges on them in a specified fashion, appellants have failed to satisfy the primary object of the standing requirement: to insure the presentation of issues in a concrete and sharply focussed factual context. See *Baker* v. *Carr*, 369 U.S. 186, 204.

## CONCLUSION

For the foregoing reasons, this appeal should be dismissed or the decision of the district court should be affirmed.

Respectfully submitted.

RALPH S. SPRITZER,
*Acting Solicitor General.*

SEPTEMBER 1967.

# APPENDIX

## In the United States District Court for the Southern District of New York

### Complaint

Florence Flast, Albert Shanker, Helen D. Henkin, Frank Abrams, C. Irving Dwork, Florine Levin and Helen D. Buttenwieser, plaintiffs,

*v.*

John W. Gardner, as Secretary of the Department of Health, Education and Welfare of the United States, and Harold Howe, 2d, as Commissioner of Education of the United States, defendants.

### I. Statement as to Jurisdiction

1. This is a civil action brought by the plaintiffs, on their own behalf and on behalf of all other similarly situated, for a temporary and permanent injunction against the allocation and use of the funds of the United States to finance, in whole or in part, instruction in sectarian schools, and to declare such use violative of the First and Fifth Amendments to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 42, U.S. Code, Sections 1331, 2282, 2284, 2201 and 2202.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand ($10,000) Dollars, as more fully appears hereinafter.

4. Plaintiffs are each citizens of the United States

and of the State of New York. Plaintiffs each pay income taxes to the United States and are each qualified legal voters of the United States. Plaintiffs are also each residents of and legal voters in the State of New York, and plaintiff Albert Shanker is a real property taxpayer in the State of New York. Plaintiff Helen D. Henkin has children regularly registered in and attending the elementary or secondary grades in the public schools of New York.

5. Defendant John W. Gardner is Secretary of the United States Department of Health, Education and Welfare and is sued herein in that capacity. Defendant Harold Howe, 2d, is the Commissioner of Education of the United States and is sued herein in that capacity.

## II. Factual Allegations

6. In 1965, the Congress of the United States enacted and, on April 11, 1965, the President of the United States approved P.L. 89–10, known as the Elementary and Secondary Education Act of 1965, Title I whereof authorizes Federal financial support for special educational programs for educationally deprived children in attendance areas where low income families are concentrated. Section 205(2)(2) of the Act provides that, in order for a local educational agency to qualify for support from the Federal Government under such Title I, it must appear "that to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who attend non-public schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services) in which children can participate without full-time public school attendance."

7. The Elementary and Secondary Education Act of 1965 authorizes, empowers and requires the defendant Harold Howe, 2d, in his capacity as Commissioner of Education, to pass upon all applications for Federal funds to finance programs under the Act and to withhold approval from any program which does not comply with the terms, conditions and limitations of the Act.

8. It was not the intent of Congress in enacting Title I, Section 205(a)(2) to require local educational agencies, in order to qualify for Federal funds, to violate the prohibitions of the First Amendment to the United States Constitution, but that local educational agencies could qualify for Federal funds by providing programs within the limitations of the Federal Constitution.

9. There are many programs within the meaning of Title I of the Elementary and Secondary Education Act of 1965 which could practicably be instituted by local educational agencies which would qualify them for the receipt of Federal funds under the Act but which would not violate the provisions of the Federal Constitution. Among these programs are those to provide pupil health and dental benefits in public and nonpublic schools, and programs for special instruction in courses such as reading, arithmetic, music and art and for guidance conducted on publicly owned premises after regular school hours and open equally to children regularly registered in public and nonpublic schools.

10. On information and belief, the Board of Education of the City of New York, a local educational agency, has in fact instituted and continues to institute and conduct programs such as these and has on the basis thereof in fact qualified for and received

Federal funds under Title I of the Elementary and Secondary Education Act of 1965.

11. On information and belief, it is feasible and practicable for the Board of Education of the City of New York to expand these constitutional programs and institute other constitutional programs and thereby qualify for and receive all the Federal funds to which it is entitled under the terms of the Elementary and Secondary Education Act of 1965.

12. On information and belief, the defendant Harold Howe, 2d, by and with the consent and approval of defendant John W. Gardner, has in the past and, unless enjoined by this Court, will in the future approve programs whereunder substantial sums of Federal funds, greatly in excess of Ten Thousand ($10,000) Dollars, allocated under Title I of the Elementary and Secondary Education Act of 1965 will be used to finance, in whole or in part, instruction in reading, arithmetic and other subjects and for guidance in religious and sectarian schools.

13. On information and belief, large sums of Federal funds, the exact amounts whereof are not known to the plaintiffs, have been and continue to be used and, unless enjoined by this Court, will continue to be used to finance and aid, in whole or in part, instruction in reading, arithmetic and other subjects and for guidance in sectarian or religious schools.

14. Title II of the Elementary and Secondary Education Act of 1965 authorizes Federal financial support for the purchase of textbooks and instructional and library materials for use in elementary and secondary schools.

15. On information and belief, large sums of Federal funds, greatly in excess of Ten Thousand ($10,000) Dollars, the exact amounts whereof are not known to the plaintiffs, with the consent and approval

of the defendants, have been and continue to be used and, unless enjoined by this Court, will continue to be used, to finance the purchase of textbooks and instructional and library materials for use in religious and sectarian schools.

## III. Causes of Action

16. *First Count.*—The determination and action of the defendants violate the First Amendment to the United States Constitution in that they constitute a law respecting an establishment of religion by reason of the fact that they effect a contribution of tax raised funds to the support of institutions which teach the tenets of a church and constitute governmental financing of religious groups and governmental action whose purpose and primary effect is to advance religion.

17. *Second Count.*—The determination and action of the defendants violate the First Amendment to the United States Constitution in that they prohibit the free exercise of religion on the part of the plaintiffs and the class they represent by reason of the fact that they constitute compulsory taxation for religious purposes.

## IV. Other Allegations

18. This suit involves a genuine case or controversy between the plaintiffs and the defendants.

19. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

## V. Prayers for Relief

20. The plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, Sections 2282 and 2284 of the U.S. Code to declare unconstitutional the determination and action of the defendants as hereinbefore set forth.

(2) That the court adjudge and declare that the determination and action of the defendants as hereinbefore set forth is not authorized or intended by the Elementary and Secondary Education Act of 1965, or in the alternative if such determination and action are within the authority and intent of the Act, the Act is to that extent unconstitutional and void.

(3) That the defendants and each of them be enjoined from approving any program for the expenditure of Federal funds to finance in whole or in part instruction or guidance services in religious and sectarian schools, or the purchase of textbooks and instructional and library materials for use in religious and sectarian schools.

(4) That a preliminary injunction pending the trial of the issues be granted to the plaintiffs against the defendants for the relief set forth herein.

(5) That the plaintiffs be granted such other and further relief as to the Court may seem just and proper.

LEO PFEFFER,
*Attorney for Plaintiffs.*

DECEMBER 1, 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1967